

BANCINSURE, INC.,

Plaintiff,

vs.

JAMES MICHAEL JACOBS et al.,

Defendants.

ORDER

I. FACTS AND PROCEDURAL HISTORY

1 of 5

1 In the present case, Plaintiff BancInsure, Inc., now known as Red Rock Insurance Co.
2 (“Red Rock”), has sued Jacobs, Glenn, Dykes, Waite, and McCole for a declaration that Red
3 Rock is not liable to reimburse them under a corporate insurance policy (the “Policy”). Glenn
4 filed a counterclaim for a declaration that Red Rock must reimburse him under the Policy for his
5 fees and costs in defending the ’84 Case. Jacobs filed counterclaims for reformation of contract,
6 breach of contract, equitable estoppel, negligent misrepresentation, and breach of the implied
7 covenant of good faith and fair dealing. The Court granted the FDIC’s motion to substitute itself
8 as a Defendant for Dykes, Waite, and McCole, because it had succeeded to their rights by
9 assignment. The FDIC filed counterclaims essentially mirroring Jacobs’s. Jacobs amended his
10 answer and counterclaim to match the FDIC’s.

11 Red Rock filed the First Amended Complaint (“FAC”), separating its declaratory
12 judgment claim into seven claims and adding three Defendants whom it later voluntarily
13 dismissed, making the fourth through seventh claims moot. (*See* First Am. Compl., ECF No. 54).
14 Red Rock seeks declarations that: (1) it has no obligation under the Policy to indemnify
15 Defendants or reimburse them for their costs of defense due to an exclusion in Section IV of the
16 Policy; (2) Defendants did not satisfy the notice of claim requirements in Section IX of the
17 Policy; and (3) there was no “loss” as defined in Section III of the Policy. The FDIC and Jacobs
18 filed second amended counterclaims without substantive changes. The originally assigned judge
19 recused himself, and the case was reassigned to this Court. The FDIC further amended its
20 counterclaims, separating its claim for breach of the implied covenant of good faith and fair
21 dealing into two claims asserting different theories and adding counterclaims for unfair claims
22 practices under Nevada Revised Statutes section (“NRS”) 686A.310 and for a declaration
23 consistent with the theories put forth in its substantive claims.

1 An Oklahoma state court put Red Rock into receivership under that state's Insurance
 2 Commissioner, who in turn asked the Court to dismiss all claims by and against Red Rock and to
 3 enjoin the parties from pursuing such claims in any court. The Court denied that motion and a
 4 subsequent motion to certify the issue for interlocutory appeal. In the meantime, Glenn and
 5 Jacobs assigned their rights to the FDIC. The FDIC further amended its answer and
 6 counterclaims. (*See* Fourth Am. Answer and Countercl., ECF No. 177).

7 Red Rock and the FDIC are the only remaining parties, and the operative pleadings are
 8 the FAC and the Fourth Amended Answer and Counterclaim ("FACC"). Red Rock has moved
 9 for offensive summary judgment on its claims and for defensive summary judgment against the
 10 FDIC's counterclaim for a contrary declaration, Glenn's counterclaim for a declaration that he is
 11 entitled to reimbursement under the Policy, and Jacobs's counterclaim for breach of contract.¹
 12 The FDIC has moved for defensive summary judgment against the first three claims of the FAC
 13 and for offensive summary judgment on its counterclaims for declaratory judgment and breach
 14 of contract.

15 **II. DISCUSSION**

16 Red Rock and the FDIC both seek summary judgment on Red Rock's claim for a
 17 declaration that paragraph A.21 of Section IV of the Policy (the "Exclusion") bars Defendants'
 18 claims thereunder. The parties have stipulated to the authenticity of the copy of the Policy
 19 adduced as Exhibit A to the FAC. (*See* Stip. & Order, ECF No. 196). The Exclusion therein
 20 reads:

21 The Insurer shall not be liable to make any payment for loss in connection
 22 with any claim based upon, arising out of, relating to, or in any way involving . . .
 a claim by, or on behalf of, or at the behest of, any other insured person, the

23 ¹ Glenn's and Jacobs's counterclaims are no longer operative, as the rights upon which they are
 24 based have been assigned to the FDIC.

company, or any successor, trustee, assignee or receiver of the company except for: . . . a shareholder's derivative action . . . an employment practices wrongful act, an electronic banking wrongful act or an electronic publishing wrongful act . . . or . . . a claim brought by an insured person for a management practices wrongful act in his or her capacity as a customer or client other than as a borrower of the company.

(Policy § IV, para. A.21, at 6–7, ECF No. 54-1).

Red Rock argues that because the FDIC is a “successor” and/or “receiver” of the Bank, the Exclusion bars claims under the Policy by the FDIC against the insureds.² Red Rock notes that three federal district courts have ruled against the FDIC under the Exclusion in other cases, that the Court of Appeals for the Tenth Circuit has affirmed a ruling in Red Rock's favor in one of those cases, *see generally BancInsure, Inc. v. FDIC*, 796 F.3d 1226 (10th Cir. 2015), and that the only case in which the district court ruled against Red Rock on the issue is currently on appeal to the Court of Appeals, *see FDIC-R v. BancInsure, Inc.*, 99 F. Supp. 3d 1084 (C.D. Cal. 2014), where oral argument was held on June 8, 2016. Because the impending decision by the Court of Appeals will likely determine the proper outcome here, the Court will stay the case pending the Court of Appeals' ruling in *FDIC v. BancInsure, Inc.*, No. 14-56132 and will not rule at this time on the Exclusion or the other bases of the motions.

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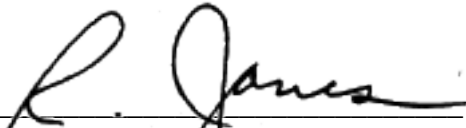
² The insureds are the former officers and directors of the Bank previously named as Defendants. As noted, they have assigned their rights under the Policy to the FDIC, and the FDIC is now pressing the insureds claims under the Policy in order to make Red Rock provide the funds for the insureds to pay damages to the FDIC for the insureds' malfeasance at issue in the '84 Case.

1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Motions for Summary Judgment (ECF Nos. 182,
3 185) are DENIED without prejudice, and the case is STAYED. The parties shall notify the
4 Court upon the issuance of the mandate in Court of Appeals Case No. 14-56132.

5 IT IS SO ORDERED.

6 Dated this 27th day of September, 2016.

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10 ROBERT C. JONES
11 United States District Judge
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